

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)	
)	
Preserving the Open Internet)	GN Docket No. 09-191
)	
Broadband Industry Practices)	WC Docket No. 07-52
)	

COMMENTS OF THE MOTION PICTURE ASSOCIATION OF AMERICA, INC.

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January 14, 2010

SUMMARY

The Motion Picture Association of America, Inc. (“MPAA”) welcomes the opportunity to provide these comments in support of the Commission’s goals to preserve a free and open Internet. MPAA and its member studios recognize that broadband holds immense promise as a means to enable consumers to get access to a wide variety of digital content in new and exciting ways. At the same time, all content creators are facing a tremendous threat from unlawful online conduct, including the theft and unauthorized distribution of a vast array of creative works. MPAA therefore appreciates the Commission’s clear recognition in the *Notice* that “open Internet principles” do not apply to “activities such as the unlawful distribution of copyrighted works”

MPAA and its member studios are excited by the potential of broadband – the most significant technological breakthrough for content distribution in at least a generation. Although the market for online distribution of creative works remains in its relative infancy, MPAA studios already have demonstrated an eagerness to enter into a multitude of consumer-oriented Internet distribution arrangements. But as the Commission itself has realized, the benefits to Americans of such arrangements are sustainable only if copyrighted content is protected against theft. Thus, the *Notice* appropriately proposes to give broadband Internet access service providers (“ISPs”) the right to “take action to counter unwanted or harmful traffic . . . and [to] decline to carry unlawful traffic, or [to] decline to carry traffic if the transfer of content is prohibited by law, including copyright law.”

Combating copyright theft online will not only help provide consumers with legitimate access to the content of their choice, it also will help this country’s creative industries to continue to serve as an engine for economic growth and job creation. The motion picture and television industry alone, which comprises more than 115,000 businesses in all 50 states, is

responsible for 2.4 million American jobs and more than \$41.5 billion in wages to American workers. Online content theft directly and significantly erodes these economic contributions and the vital role that the motion picture and television industry, like all creative industries, can and should continue to play in America's economic recovery. Likewise, inasmuch as illegal content currently clogs broadband pipes and undermines consumer confidence in the safety and security of the Internet, a reduction in unlawful online activity would help the Commission achieve its goal of widespread broadband deployment and adoption.

For all of these reasons, MPAA urges the Commission, as it considers its approach to network neutrality, to make clear that ISPs are not only permitted, but encouraged, to work with content owners to employ the best available tools and technologies to combat online content theft. Service providers also should be encouraged to work with content owners to implement consumer education programs that can help law-abiding Internet users find legitimate sources for online creative works, while simultaneously warning repeat infringers that they risk consequences if they continue to violate the law.

The *Notice* rightly proposes that ISPs should have the ability to engage in reasonable network management; if the Internet is to be both open and *safe*, the FCC should encourage ISPs to use this ability to make robust efforts to combat content theft. As Chairman Genachowski has made clear, “[t]he enforcement of copyright and other laws and the obligations of network openness can and must co-exist.” Ultimately, the Commission should ensure that content owners and ISPs have the flexibility to innovate and develop the next generation of tools and techniques necessary to fight the scourge of unlawful online conduct. MPAA is confident that, if given the opportunity, the ingenuity of private industry will yield new generations of ever-more-sophisticated online protection technologies, which will be needed because content

thieves are themselves constantly evolving their practices and developing new technologies to evade law enforcement and network management.

Equally important, as the Commission considers its nondiscrimination and transparency objectives, it should remain cognizant that a free and thriving Internet depends on continuous innovation and business model experimentation. In particular, as the Commission has acknowledged, compelling creative works are likely to be among the key types of content that drive broadband adoption. If this content is to be attractive to consumers, it must be delivered with a high quality of service and without latency, jitter, pixilation or interruption. The *Notice* reflects a proper concern that an overly-broad approach to nondiscrimination could risk foreclosing the development of consumer-oriented new business models, and that special quality of service assurances may be appropriate in order to “provide consumer benefits.” Thus, especially given the nascent market for the delivery of online video, MPAA believes that the Commission’s goals would be well served by an approach to network neutrality that allows for different means by which content providers and ISPs might arrange to deliver content, other than in instances involving demonstrably anti-competitive consequences or effects.

MPAA also supports the Commission’s goal of ensuring that consumers are informed about the methods that ISPs use to manage network traffic both to protect personal privacy and to safeguard the security and reliability of the Internet. Indeed, MPAA believes that the “sunlight” generated by transparency can provide adequate assurance that consumers would not be harmed by either anti-theft technologies or business model innovation.

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COMMENTS OF THE MOTION PICTURE ASSOCIATION OF AMERICA, INC.

The Motion Picture Association of America, Inc. (“MPAA”), on behalf of its member studios, hereby respectfully submits these comments in response to the Commission’s Notice of Proposed Rulemaking, released October 22, 2009, relating to proposed rules to preserve a free and open Internet.¹

MPAA strongly supports the Commission’s commitment to ensuring that the future of broadband in the United States is characterized by a robust and widely accessible Internet experience and by safety and security for consumers and creators alike. As the Commission recognized in the *Notice*, the unauthorized distribution of stolen property on the Internet is a critical issue, and MPAA agrees with the Commission’s tentative conclusion that “open Internet principles” do not apply to “activities such as the unlawful distribution of copyrighted works, which has adverse consequences on the economy and the overall broadband ecosystem.”² MPAA also appreciates that the *Notice*

¹ See *In re Preserving the Open Internet; Broadband Industry Practices*, GN Docket No. 09-191, WC Docket No. 07-52, FCC 09-93 (Notice of Proposed Rulemaking) (rel. Oct. 22, 2009) (the “*Notice*”).

² *Id.* at ¶ 139.

recognizes the importance of “experiment[ation] with new technologies and business models in ways that benefit consumers.”³ MPAA supports the Commission’s goals in this proceeding and welcomes the opportunity to provide these comments.

In these comments, MPAA first explains the critical importance of protecting creative content from theft if broadband is to thrive as an engine for economic growth and job creation as well as consumer choice. MPAA supports the Commission’s proposed mechanism for addressing and preventing content theft – reasonable network management. Second, MPAA details why it is essential that the Commission’s approach to nondiscrimination and transparency be crafted to permit innovation and experimentation with new business models in order to ensure that the Internet remains a laboratory for ingenuity and experimentation and, in turn, a driver of pioneering new options for consumers.

I. COMPELLING CREATIVE WORKS, SUCH AS THOSE PRODUCED BY MPAA MEMBER STUDIOS, PROVIDE ENORMOUS BENEFITS TO BROADBAND USERS AND THE PUBLIC AT LARGE, BUT THOSE BENEFITS ARE THREATENED BY RAMPANT THEFT

MPAA and its member studios believe that broadband represents the most significant technological breakthrough for content distribution in at least a generation. As Americans continue to embrace the broadband experience, MPAA studios are deeply engaged in content innovation, allowing consumers to access a compelling variety of digital entertainment in new and exciting ways. Although the online distribution market for creative content is still in its relative infancy, MPAA studios already have shown their commitment to broadband distribution by entering into hundreds of Internet distribution

³ *Id.* at ¶ 103.

arrangements, and they are committed to the further development of innovative business models to drive consumer adoption of digital delivery and the promise of the broadband Internet, thereby helping to generate economic growth and employment.

No industry can, or should be expected to, compete against free-by-theft distribution of its own products. In consequence, if Americans are to obtain the true benefits that broadband can provide, copyrighted content must be protected against theft and unauthorized online distribution.⁴ Thus, the Commission appropriately “emphasize[s] that open Internet principles apply only to lawful transfers of content.”⁵ As content creators continue to develop ways for consumers lawfully to access creative works online, the government should foster an environment that reduces the ability of unlawful content to undermine those legitimate options. Content creators, including MPAA studios, cannot tackle this problem alone. They depend on broadband Internet access service providers (“ISPs”) to cooperate in combating content theft. It is therefore essential that government policies explicitly permit – and encourage – ISPs to work with content creators to utilize the best available tools and technologies to combat online content theft.

A. Creative Content Drives Adoption of Broadband Technologies, Spurs Economic Growth, and Creates Millions of Jobs

Consumer adoption of new media technologies always has been spurred by access to compelling creative works; the same is true for the Internet, which is but the latest – albeit most powerful – technology with the capacity to make it easier and more enjoyable for consumers to access the content of their choice. The Internet without

⁴ See *id.* at ¶¶ 16, 108, 139.

⁵ *Id.* at ¶ 139.

content would be nothing more than a collection of hardware; a series of computer links and protocols with great capacity to communicate but nothing to say. It is the content – whether galvanizing political speech, critical healthcare data, news, educational programs, information or compelling audio-visual entertainment – that flows over and through the Internet that makes the breakthrough technology so powerful, and it is the ability to access that content that drives consumers to purchase and use broadband services. Content creators across the country, including the motion picture and television industry, are excited to take advantage of the enormously positive impact that online distribution can have in enabling consumers to access a wide variety of creative works in new and innovative ways. Accordingly, MPAA strongly supports the Commission’s goal of preserving a free and open Internet.

For the United States, however, entertainment content is not simply a means to encourage broadband adoption or any other communications or technology advancement. Rather, the production and distribution of motion pictures and television programs is one of America’s most valuable cultural and economic resources. In 2008, the motion picture and television industry was responsible for 2.4 million American jobs and more than \$41.5 billion in wages to workers in America.⁶ The industry paid more than \$38 billion to U.S. vendors and suppliers, small businesses and entrepreneurs, as well as \$13 billion in income and sales taxes, in 2007.⁷ The industry comprises more than 115,000 businesses in all 50 states – greater than 80% of which employ fewer than 10 people. The industry carries a positive trade balance around the world and a \$13.5

⁶ See *The Economic Impact of the Motion Picture & Television Industry on the United States*, Motion Picture Association of America, Inc. (April 2009, and 2010 update, in progress).

⁷ See *id.*

billion trade surplus – which accounts for 7% of the total U.S. private-sector trade surplus in services.⁸

MPAA studios have embraced digital delivery platforms and believe that broadband will serve as an increasingly important keystone to their ongoing creative and economic contributions to the country. MPAA studios are actively building a wide variety of legitimate online outlets and alternative digital distribution forms, including electronic downloads of permanent copies of films and television programs, various rental businesses involving video-on-demand and streaming, distribution over advertising supported streaming sites, and digital lockers for consumer storage and retrieval of purchased movie and television files.

In addition to their own online outlets, MPAA studios have partnered with numerous other companies to make their film and television programs available on-demand directly over the Internet. These partners and channels include: Amazon, Apple, Blockbuster, Comcast, Microsoft, Roxio CinemaNow, Sony's Playstation Network service, Time Warner Cable, and Vudu, to name just a few. Other online distribution partners include AT&T, Cox, DirecTV and Verizon. MPAA members' content is available to consumers directly over broadband Internet connections via a wide array of devices, including personal computers, game consoles (*e.g.*, Xbox, Playstation 3), Internet-connected televisions and Blu-ray players, and stand-alone devices (*e.g.*, Apple TV, Roku, Sezmi, Vudu, and Zillion). All of these efforts and ventures have enabled

⁸ U.S. Department of Commerce, Bureau of Economic Analysis, Survey of Current Business, October 2009.

millions of Americans to gain legitimate online access to film and television content in new and exciting ways.

Nielsen recently reported that more than 138 million unique viewers in the United States watched streamed online video in November 2009, an increase of 11% over the prior year.⁹ In all, Americans watched more than 11 *billion* streams of video in November, up nearly 17% from the prior year (and that figure does not include downloaded video).¹⁰ The average viewer spent 200 minutes of time watching streaming videos online that month.¹¹ Hulu.com, a joint venture mostly owned by several MPAA-member studios and featuring content from a host of creators, had more than 650 million videos streamed in November.¹² Each of the content delivery web sites of Fox (owned by News Corporation), ABC Television and ESPN (owned by Disney), and Nickelodeon (owned by Viacom) also had at least 105 million videos streamed that month alone.¹³ While there is less data available on downloading, Apple has reported that on iTunes, over 250 million television episodes have been purchased and over 33 million movies have been purchased or rented.¹⁴

⁹ *Total Online Video Streams Viewed Up 17% in November*, The Nielsen Company (December 15, 2009).

¹⁰ *See id.*

¹¹ *See id.*

¹² *See id.*

¹³ *See id.*

¹⁴ Apple, "Movie Fans Can Buy & Rent Films in High Definition on the iTunes Store" (March 31, 2009).

These figures offer a mere glimpse of the ultimate power that online video has to attract American consumers, given the reality that huge numbers of Americans are only just beginning to access creative content online.

B. Theft Threatens the Benefits Offered by Creative Content

Creating compelling audiovisual content is an extraordinarily expensive proposition. It is not uncommon for blockbuster movies to cost well over \$100 million to produce and market; a single episode of an hour-long television drama easily can cost more than \$2 million. It also takes time and significant resources to create lawful platforms for online distribution of creative works. In addition to the investment in technology, these legitimate sites also must spend large amounts of money on marketing and communications to reach consumers and let them know that content is available.¹⁵

Unfortunately, legal platforms must compete for consumers' attention with illegal alternatives that make copyrighted material available without the creator's permission. In 2007, Stephen E. Siwek, a principal at Economists Incorporated, authored a study concluding that unlawful distribution of intellectual property already costs Americans hundreds of thousands of jobs and federal, state and local governments billions of dollars in annual revenues.¹⁶ Equally important, Mr. Siwek explained that the "economic impact of copyright piracy is not limited to the companies that design, create and sell copyright protected works. The impact of piracy flows throughout the U.S.

¹⁵ Hulu.com, for example, ran an advertisement during *Super Bowl XLIII* in February 2009. Although the site has witnessed tremendous growth in terms of audience traffic, Hulu.com spent roughly \$3 million to broadcast the commercial (and that figure does not include substantial production costs).

¹⁶ See Federal Communications Commission, National Broadband Plan Workshop, The Role of Content in the Broadband Ecosystem, Transcript (Sept. 17, 2009) (the "Transcript"), at 93 (Testimony of Dan Glickman) (citing *The True Cost of Copyright Industry Piracy to the U.S. Economy*, Stephen E. Siwek (October 2007) ("*Siwek Study*"), at i, 11-13).

economy. Piracy in one segment of the economy can affect other industries because the economy is an interdependent system.”¹⁷ Thus, losses from copyright theft harm not just producers of creative works, but also all of the various small businesses whose revenues are tied to content production. In particular, using *conservative* estimates, Mr. Siwek found that copyright theft from the motion pictures, sound recordings, business and entertainment software and video games industries costs the U.S. economy \$58 billion in total output, results in the loss of nearly 375,000 jobs for American workers, and costs Federal, state and local governments \$2.6 billion in lost tax revenue.¹⁸ Copyright theft can have an equally devastating effect on retirement plans, as pensions for employees in guilds relating to the motion picture and television industry often are tied to the very downstream revenues (*e.g.*, DVD sales) most at risk from content theft. In all of these areas, the already large losses caused by copyright theft will only be exacerbated further as broadband speeds and consumer usage of broadband increase, absent a successful widespread deployment of technological and other tools to combat theft.

Moreover, online content theft creates vast amounts of unlawful traffic that currently clogs the Internet and degrades service to law-abiding consumers. While

¹⁷ *Id.* at 3. A recent study by the RAND Corporation addressing counterfeiting of film content in hard goods confirms the link between content theft and devastating effects on society beyond those strictly economic. According to Rand, “The case studies provide compelling evidence of a broad, geographically dispersed, and continuing connection between film piracy and organized crime, as well as evidence that terrorist groups have used the proceeds of film piracy to finance their activities.” See *Film Piracy, Organized Crime, and Terrorism*, The RAND Corporation (2009) (available at http://www.rand.org/pubs/monographs/2009/RAND_MG742.pdf). Moreover, with respect to stolen content distributed online, illegal web sites have the look and feel of legitimate and professional businesses and often are advertising- and subscription-supported, which makes the sites confusing to consumers. These sites also collect consumers’ personal and financial information, which could lead to identity theft and other types of consumer fraud. Not only do these sites engage in theft that is harmful in its own right, but the purveyors of stolen copyrighted works also make it that much more difficult for legitimate sites to gain consumer acceptance and confidence.

¹⁸ See *Siwek Study*, at i, 11-13.

determining the precise amount of bandwidth attributable to unlawful content is difficult, various studies, reports and expert analyses lead to a reasonable conclusion that upwards to 50% or more of bandwidth is consumed by the illegal trafficking in copyrighted content.¹⁹ No matter how free and open the Internet might be in principle, connections rendered sluggish or unworkable by the transmission of vast amounts of stolen content will only discourage consumer confidence in the online experience. Reducing unlawful online conduct will help assuage the concerns that many law-abiding consumers have about the safety and reliability of the online environment. The Commission is correct to seek to “provide a safe and secure Internet experience for . . . users.”²⁰ If consumers fear that accessing content online will expose them and their families to rampant viruses, malware, or phishing, identity theft and financial fraud, it will be exceedingly difficult, if

¹⁹ See, e.g., *Approaching the Zettabyte Era*, Cisco Systems (2008) (study finding that as much as 55% of all residential broadband traffic in 2007 was comprised of peer-to-peer); see also *The Cautionary Tale of Video Downloads*, Multichannel News (March 22, 2008) (describing a Yankee Group analysis that found that “[c]able operators continue to report that 60% to 75% of their Internet traffic is being generated by [peer-to-peer] file-sharing” and that “5% to 10% of Internet users are generating 80% to 90% of this [peer-to-peer] traffic”). Moreover, the Yankee Group “and many other experts believe the vast majority of BitTorrent’s [a major peer-to-peer network] Web traffic consists of content that is being distributed in violation of copyright law. Indeed, 90% of [peer-to-peer] downloads are still of illegally copied content,” according to SafeNet. See *id.* According to a report produced by Interstream, 90% of the content available on peer-to-peer networks consists of copyright infringing files. See *The Past, Present & Future of Television*, Interstream (June 2009). In a December 2009 decision, a federal District Court accepted expert witness analysis and testimony that 95% of downloads occurring through file sharing sites operated by the defendants using BitTorrent and eDonkey protocols were downloads of copyright infringing content. See *Columbia Pictures Industries, Inc., et al. v. Gary Fung, et al.*, CV 06-5578 SVW (C.D. Cal. Dec. 21, 2009). The Swedish government earlier this year implemented a new law designed to stop online property theft; the law requires ISPs to disclose the IP addresses of consumers who download infringing content. See *Swedish Antipiracy Law: Traffic Down, ISP Rebels*, CNETnews.com (April 17, 2009). Almost immediately after the law went into effect, country-wide Internet traffic dropped by almost 50%, leading many to conclude that a tremendous amount of the country’s Internet traffic had consisted of infringing material prior to the law becoming effective. See *id.*

²⁰ Notice, at ¶ 108.

not impossible, for the Commission to achieve Congress' and the Administration's vision of a nation where all Americans not only have access to, but actually adopt, broadband.²¹

C. The Commission Should Encourage ISPs to Use the Best Available Tools and Technologies to Combat Online Content Theft

As MPAA has detailed in previous filings before the Commission, the movie industry is engaged in a wide range of anti-theft efforts to address content theft.²² With respect to online theft of creative works, a variety of approaches, including consumer education programs and technological tools, can meaningfully contribute to thwarting unlawful conduct and protecting the security of the Internet. But content creators cannot meaningfully reduce the threat of unlawful online conduct on their own; they must rely upon ISPs to take action as well. MPAA therefore greatly appreciates the *Notice*'s acknowledgment that network operators may "tak[e] reasonable steps to address unlawful conduct on the Internet,"²³ as well as the Commission's tentative conclusion defining reasonable network management as: "(a) reasonable practices employed by a provider of broadband Internet access service to (i) reduce or mitigate the effects of congestion on its network or to address quality of service concerns; (ii) address traffic that is unwanted by users or harmful; (iii) prevent the transfer of unlawful content; or (iv) prevent the unlawful transfer of content; and (b) other reasonable network management practices."²⁴

²¹ See *id.* at ¶¶ 30, 82.

²² See, e.g., *In re A National Broadband Plan for Our Future*, GN Docket No. 09-51, Comments of the Motion Picture Association of America, Inc. in Response to the Workshop on the Role of Content in the Broadband Ecosystem (dated Oct. 30, 2009).

²³ *Notice*, at ¶ 139.

²⁴ *Id.* at ¶ 135.

In the absence of clear guidance from the Commission, ISPs – fearful of government reproach – may be reluctant to take advantage of the best available tools and techniques to prevent and combat online content theft.²⁵ Thus, the FCC should inform and encourage service providers that they can and should “refuse to transmit copyrighted material if the transfer of that material would violate applicable laws.”²⁶ Indeed, as the *Notice* recognizes, Commission precedent already permits “providers, consistent with federal policy, [to] block . . . transmissions that violate copyright law.”²⁷ In any event, MPAA strongly urges the Commission not to interpose any new legal or regulatory obstacles that would have the effect of barring or deterring the use of any otherwise lawful methodology as part of an ISP’s reasonable network management regime.

As Chairman Genachowski consistently has made clear, the promise of a free and open Internet to “unleash[] the creative genius” for all Americans cannot be fulfilled if the online world is subject to anarchy and chaos: “It is vital that illegal conduct be curtailed on the Internet. . . . [O]pen Internet principles apply only to lawful content, services and applications – not to activities like unlawful distribution of copyrighted

²⁵ See, e.g., *In re Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation*, 23 FCC Rcd 13028, 13058 (2008).

²⁶ *Notice*, at ¶ 139.

²⁷ *Id.* In fact, copyright law already requires that service providers meet a number of conditions in order to receive the benefit of the safe harbor provided by the Digital Millennium Copyright Act. See 17 U.S.C. § 512. In adopting the safe harbor provision Congress clearly intended to promote a framework in which service providers and copyright owners work in a cooperative fashion to address the challenges related to online theft. See S. Rep. 105-190 (1998), at 20 (noting that section 512 “preserves strong incentives for service providers and copyright owners to cooperate to detect and deal with copyright infringements that take place in the digital networked environment”). Whatever requirements are imposed by the FCC should further that policy and certainly should in no way be in conflict with those requirements.

works, which has serious economic consequences. The enforcement of copyright and other laws and the obligations of network openness can and must co-exist.”²⁸

In applying the definition of reasonable network management to real-world examples of ISP behavior, the Commission should make clear that service providers can and should use the best available technologies and policy approaches to combating online theft. As the Commission observed in the *Notice*: “[W]e do not presume to know now everything that providers may need to do to provide robust, safe, and secure Internet access to their subscribers, much less everything they may need to do as technologies and usage patterns change in the future.”²⁹ Accordingly, the FCC should adopt its tentative conclusion and encourage service providers to “experiment and innovate as user needs change,”³⁰ and should emphasize the importance and urgency of detecting and preventing the transmission of unlawful content.

In particular, consumer education programs can be a valuable and effective tool to combat unlawful online activity. When Internet users seek access to stolen copyrighted material online, educational strategies can help inform them about authorized alternatives for online content, which in turn could spur broadband adoption as consumers seek legitimate offerings. An education program also can succeed in convincing people to cease their infringing behavior by sending consumers (when they attempt to unlawfully access or upload copyrighted materials) notices advising them that

²⁸ *Preserving a Free and Open Internet: A Platform for Innovation, Opportunity, and Prosperity*, Prepared Remarks of Chairman Julius Genachowski, Federal Communications Commission, The Brookings Institution (Sept. 21, 2009).

²⁹ *Notice*, at ¶ 140.

³⁰ *Id.*

their behavior may violate applicable laws and the terms of service agreements with their ISPs. Others, however, inevitably will ignore these types of warnings. Thus, the educational strategy must encompass additional steps – known as graduated response – which incorporate a series of increasingly-heightened sanctions. Otherwise, those who would continue to engage in unlawful behavior will have no incentive to change (and even those who initially heed warnings might revert to unlawful activity if they perceive that their actions would not result in any serious consequences). Ultimately, graduated response can be successful both because it educates the great majority of law-abiding Americans to cease engaging in illegitimate behavior and because truly bad actors know that they can be subjected to meaningful sanctions.

It is essential that ISPs have the flexibility to develop and employ new technological means to deal with content theft as the nature of the threat changes, as it surely will. The tools employed today simply may not, and likely will not, work to combat future forms of unlawful online activity. In the short time that broadband penetration has made the online delivery of long-form audiovisual content feasible, theft of this content has rapidly evolved and taken on new and different forms.³¹ In light of this dynamic environment, MPAA urges the Commission not to pre-determine whether any particular technology should be available in ISPs' and content owners' anti-theft

³¹ In the late 1990s, infringing content primarily was traded via small private online networks (*e.g.*, IRC, Usenet). With the introduction of peer-to-peer technologies, online content theft largely moved first to centralized peer-to-peer protocols, such as Napster, and then to de-centralized technologies such as Grokster and BitTorrent. Today the online market has further fragmented and content thieves have taken advantage of new online technologies, with streaming sites (*e.g.*, Megavideo, Supernovatube) and cyberlockers (*e.g.*, ZShare, Megaupload) representing growing share of unlawful conduct. Moreover, a secondary market has arisen in the form of "linking sites" (*e.g.*, Watch-Movies-Online.tv, TVShack.net), which are legitimate-looking sites that index stolen content online, and generate sometimes substantial revenue via advertising and/or subscriptions.

toolkits. MPAA firmly believes that future developments will yield new generations of ever-more-sophisticated online protection technologies, just as content thieves are themselves constantly evolving their practices to evade law enforcement and network management.

In fact, if the Commission wants to see a meaningful and long-term reduction in the amount of bandwidth consumed by illegal content, it should foster an environment in which innovation itself is able to flourish and new tools are not only permitted, but encouraged, to develop. The government should create incentives for this investment by clarifying that industry efforts will be rewarded with open and flexible regulations.³²

MPAA understands the Commission's concern that consumers should be informed when these techniques are employed to combat online theft. Thus, as described below, MPAA supports the Commission's proposal to require transparency so that consumers are appropriately advised about how methodologies are used by their ISPs (and how ISPs intend to respect consumer privacy and protect personal data).³³

Ultimately, the ingenuity of private industry can develop technologies and network management tools that lead to sophisticated new methods of combating theft, ensuring that bandwidth is utilized efficiently, providing a smooth and safe online experience for consumers, and protecting the enormous public and private investment in

³² See *Steal These Policies: Strategies for Reducing Digital Piracy*, The Information Technology & Innovation Foundation (December 2009), at 6, 22 (describing the value of content protection technologies, encouraging government not to “preclude those impacted by digital piracy, including copyright holders and ISPs, from taking steps, both technical and non-technical, to limit digital piracy” and urging “[g]overnment policies [to] support technological innovation wherever possible, as innovation is a key driver of economic growth and productivity”).

³³ See *infra*, at 20.

our nation’s broadband networks. For all of these reasons, the Commission should encourage ISPs to engage in reasonable network management to combat online content theft by using the best available tools and technologies.

II. IN CONSIDERING NONDISCRIMINATION AND TRANSPARENCY, THE COMMISSION SHOULD RECOGNIZE THAT A FREE AND THRIVING INTERNET DEPENDS ON CONTINUOUS INNOVATION

A. A Carefully Tailored Approach to Nondiscrimination Protects Competition While Promoting Experimentation That Maximizes Consumer Welfare

In the *Notice*, the Commission asks whether its proposed definition of “nondiscrimination” would “best serve[] the public interest,” “result in higher social welfare,” have an impact on “innovation” and “broadband Internet access service users,” or raise significant concerns under the First Amendment.³⁴ MPAA understands and supports the Commission’s desire to ensure that broadband content and application providers who wish to reach consumers are not faced with unreasonably discriminatory barriers from ISPs, whether of a monetary nature or otherwise. At the same time, MPAA agrees that broadband will best serve the goals of competition and innovation, while advancing consumer welfare, if the Commission’s efforts to prevent demonstrably anti-competitive acts also afford content, application and service providers the ability to experiment and create new business models and to deliver the best available quality of service for existing ones. A properly-crafted approach to nondiscrimination advances both of these ends, protecting the vitality of the public Internet and spurring the very type of innovation and continued investment in the digital distribution business that the

³⁴ *Notice* at ¶¶ 106, 111-12, 116.

Commission is striving to stimulate. Importantly, these new means of distribution of legitimate content will provide consumers with meaningful alternative choices to web sites that unlawfully distribute creative works. Such an approach also will minimize any First Amendment concerns. MPAA looks forward to working with the Commission to fashion an approach to nondiscrimination that meets all of these important goals.

First and foremost, MPAA agrees with the Commission that ISPs should not be permitted to engage in demonstrably anti-competitive acts. In the *Notice*, the Commission discusses the possibility that ISPs might discriminate in favor of their own (or affiliated) services or content, and MPAA strongly supports the FCC's proposed condemnation of such discrimination.³⁵ As the Commission explains, discrimination is a particular concern where ISPs are vertically integrated or affiliated with content or application providers because they may "have an incentive to use this gatekeeper role to make it more difficult or expensive for end users to access services competing with those offered by the network operator or its affiliates."³⁶

At the same time, MPAA urges the FCC to craft its approach to nondiscrimination in a way that does not stifle innovation in the nascent market for the delivery of digital content. Absent the gatekeeping distortion that could be caused by affiliation between content and distribution, and other similarly demonstrably anticompetitive gatekeeping activities by ISPs, the MPAA urges the Commission to ensure that any *ex ante* restrictions on Internet networks allow content creators the ability

³⁵ See *id.* at ¶¶ 72-73.

³⁶ *Id.* at ¶ 72.

to work with network providers to develop and maintain content delivery services that will delight consumers and fuel economic growth.

However the Commission moves forward to advance its policy objectives, content or application providers should be allowed to enter into quality of service agreements with ISPs that enhance consumer welfare and consumer choice. Indeed, the questions posed in the *Notice* reflect a proper concern that an overly-broad approach to nondiscrimination could risk foreclosing the development of potential business models for digital distribution that enhance consumer welfare and choice.³⁷ As the Commission itself has acknowledged, promoting the online distribution of high quality digital content is important to driving widespread consumer adoption of broadband, and certain quality of service assurances could well “provide consumer benefits” by improving the quality of distribution of creative content.³⁸ Thus, the *Notice* recognizes that a strict nondiscrimination methodology may be inappropriate for certain digital distribution services.³⁹ MPAA agrees with the Commission’s recognition that consumer-friendly digital distribution services “may require enhanced quality of service to work well,”⁴⁰ and believes that permitting content creators and ISPs to agree on quality of service assurances would enable consumers to enjoy innovative forms of entertainment without delay, disruption, or interference. Achievement of the Commission’s nondiscrimination

³⁷ See *id.* at ¶¶ 113-14, 151-53.

³⁸ See *id.* at ¶ 148.

³⁹ See *id.* at ¶ 108.

⁴⁰ *Id.*

objectives need not entail the foreclosure of the evolution of such new consumer-friendly services.

In particular, high quality of service (including the absence of latency, jitter, pixilation and interruptions) is essential for video content, particularly high definition, premium content, such as film and television programming. For these services to meet the level of consumer demand the Commission hopes to create, content providers may well need to be able to enter into arrangements with access providers to ensure that the content is delivered in the form and quality which the customer is entitled to expect.⁴¹

Moreover, these types of agreements will spur the very type of innovation and continued investment in the digital distribution business that the Commission is striving to stimulate. Content owners are assuming significant risks as they transform their analog delivery models into digital models and embrace online delivery. It would be harmful to the potential development of this marketplace and injurious to consumers if digital content delivery cannot be provided with the same level of quality consumers have come to expect from offline media like Blu-ray and DVD.

Such consumer-enhancing arrangements would also assist in combating copyright infringement. If providers and owners of creative works have no means of differentiating the quality of their content (through enhanced delivery by ISPs) from the

⁴¹ Consumers simply will not tolerate – nor should they – a viewing experience that involves frame freezing, interruption for buffering, flutter of video or audio or other interference. According to one recent study, more than 81 percent of all online video viewers navigate away from a video stream if they encounter a video clip rebuffering. *See 4 Out of 5 Viewers Leave If a Stream Buffers Once*, The GigaOM Network (posted Dec. 10, 2009) (citing study by Tubemogul) (available at www.newteevee.com/2009/12/10/4-out-of-5-viewers-leave-if-a-stream-buffers-once (last visited Jan. 14, 2010)). The study “took a close look at 192 million video streams over the course of 14 days to figure out how much rebuffer matters. The result: 6.81 percent of all streams rebuffer at some point, and around 2.5 percent rebuffer twice.” *See id.* Far from being a temporary phenomenon, service disruptions could become more frequent in the future as more and more people consume increasing amounts of online video content.

quality of unlawful content, they will be severely hampered in their ability to attract consumers to legal distribution sources. A consumer will have less incentive to seek out legitimate content if it cannot be delivered in the best available quality.

The Commission has cited the need to promote “experiment[ation] with new technologies and business models in ways that benefit consumers.”⁴² The Commission has acknowledged that, “given the extraordinarily rapid and wholly unpredictable evolution of services and applications,” “policymaking principles [must be] centered on supporting innovation and protecting consumer interests in an agile, rather than prescriptive, way.”⁴³ These pronouncements counsel in favor of an approach to nondiscrimination that is carefully tailored to allow for arrangements for enhanced quality of service, especially given that the digital distribution business is at a very early stage of development.

MPAA therefore urges the Commission to consider whether its goals would be best achieved by creating a framework that allows substantial flexibility in the types of business arrangements into which content providers may enter to ensure high quality delivery of their content to consumers.⁴⁴ Permitting such flexibility also would address the concerns about potential tension with the First Amendment,⁴⁵ which implicates not only the rights of speakers to send information but also the rights of

⁴² *Notice*, at ¶ 103; *see also id.* at ¶ 9 (stressing need to protect the ability of industry “to experiment with technologies and business models”).

⁴³ *Id.* at ¶ 89 (citation and internal quotation marks omitted).

⁴⁴ At the very least, the Commission should clarify that broadband Internet access service providers are permitted to protect the quality of service of streaming media applications, digital downloads, gaming and similar latency-sensitive traffic, as suggested in the *Notice*, at ¶ 137.

⁴⁵ *Id.* at ¶ 116.

consumers to receive it.⁴⁶ The delivery of digital content over the Internet to consumers is a form of protected communication.⁴⁷ Part of that protection is the ability of speakers to express themselves and to “select what they believe to be the most effective means for so doing.”⁴⁸

In short, allowing commercial arrangements designed to maximize a consumer’s content experience would advance all of the interests outlined in the *Notice*. The MPAA shares the Commission’s goal of ensuring a quality experience for the consumer for digital content delivered over the Internet.

B. Transparency Can Ensure That Content Owners and Service Providers Have the Ability to Innovate and Combat Theft Without Undermining Consumer Expectations

MPAA agrees with the Commission that “sunlight is the best disinfectant,” and accordingly supports the FCC’s goals with respect to transparency.⁴⁹ Indeed, MPAA believes that if consumers receive adequate disclosure about ISPs’ network management practices, there should be little fear of risk to consumer welfare from either experimentation with new business models or implementation of the tools and techniques needed to combat theft. As the *Notice* explains, “transparency” would “protect and empower consumers to maximize the efficient operation of relevant markets by ensuring that all interested parties have access to necessary information”⁵⁰ If

⁴⁶ See *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 781-84 (1978).

⁴⁷ See *Reno v. ACLU*, 521 U.S. 844 (1997).

⁴⁸ *Meyer v. Grant*, 486 U.S. 414, 424 (1988). See also *Riley v. National Federation of the Blind, Inc.*, 487 U.S. 781, 789 n.5 (1988) (applying First Amendment to financial regulation of professional fundraisers).

⁴⁹ *Notice*, at ¶ 118.

⁵⁰ See *id.*

ISPs disclose their network management practices, consumers would know up front how their service providers intend to manage their networks to efficiently distribute content and protect personal data, as well as how they might implement policies to prevent the transmission of stolen materials.

At the same time, achieving transparency objectives should not require disclosure of trade secrets, key technology protocols or confidential business information. In particular, the Commission should ensure that ISPs have sufficient flexibility to avoid the compelled disclosure of details that would permit criminals or hackers to counter or exploit weaknesses in any effort to manage network traffic. As the *Notice* appropriately recognizes, the approach to transparency should be “minimally intrusive,”⁵¹ so while a consumer should be permitted to know the policies that his or her service provider intends to rely upon in managing network traffic, end-users should not be given a road map to undermine or counteract ISPs’ management techniques.

MPAA ultimately agrees that an approach to transparency focusing on reasonable information disclosure to the public can be an effective and appropriate component of network neutrality.

III. CONCLUSION

In sum, if compelling content is to serve as a foundation for a thriving broadband Internet, creative works cannot be subject to rampant theft. Indeed, online content theft threatens great harm to a vital segment of the American economy as well as to economic growth and job creation. Unlawful online activity also undercuts broadband

⁵¹ *Id.*

use and adoption, clogging already taxed network connections with illegal activity, limiting the amount and variety of lawful content on the Internet and undermining consumer confidence in the Internet as a safe and secure environment. Accordingly, as the Commission considers network neutrality, it should ensure that ISPs have available the necessary tools, and it should encourage ISPs to use the best available software, technologies and practices, to combat online content theft.

Respectfully submitted,

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January 14, 2010